LIBRARY
PREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 29 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

No. 347.

OCTOBER TERM, 1970.

VLADISLAV KELEMEN, *et al.*,
Petitioners,

v.

SERBIAN ORTHODOX CHURCH CONGREGATION OF ST. DEMETRIUS OF AKRON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

BERNARD R. ROETZEL,
900 First National Tower,
Akron, Ohio 44308,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Presentation of the Federal Question 1

Counter-Statement of the Case 3

Reasons For Not Granting the Writ 7

1. Such public interest as there now is in the powers and limitations of civil courts is only concern for the choice from among the methods permitted to the various state court systems for resolution of church disputes consistent with this Court's previous pronouncements in *Mary Blue Hull* and *Eldership* 7

2. The decision of the Supreme Court of Ohio is entirely consistent with the decision of this Court in interpreting Amendments I and XIV to the Constitution of the United States 9

Conclusion 13

TABLE OF AUTHORITIES.

Cases.

Erie v. Tompkins, 304 U.S. 64 8

Gonzales v. Roman Catholic Archbishop of Manila, 280 U.S. 1 12

Maryland and Virginia Eldership of the Churches of God, et al., v. Church of God at Sharpsburg, Inc., et al., 396 U.S. 367 ..... 7, 8, 10, 11, 13

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 ..... 4, 5, 6, 7, 11, 13

Serbian Eastern Orthodox Congregation of St. George, Elizabeth, N. J., etc., v. Serbian Eastern Orthodox Congregation of "St. George," Elizabeth, N.J. (Diocese for Eastern States of America and Canada, et al.), 397 U.S. 961 7

Watson v. Jones, 80 (13 Wall.) U.S. 679 ..... 4, 10

Keyser v. Stansifer, 6 O. 634 10

Constitution and Statutes.

Constitution of the United States:

Amendment I 1, 9, 13

Amendment XIV 1, 9

Revised Code of the State of Ohio, Chapters 1715 (particularly Sec. 1715.17) 9

In the Supreme Court of the United States

No. 347.

OCTOBER TERM, 1970.

VLADISLAV KELEMEN, *et al.*,

Petitioners,

v.

SERBIAN ORTHODOX CHURCH CONGREGATION OF ST. DEMETRIUS OF AKRON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

PRESENTATION OF THE FEDERAL QUESTION:

Petitioners quote one paragraph of the opinion of the Supreme Court of Ohio on page 7 of the Petition itself, and then assert that this paragraph resulted in a denial of "our constitutional rights under Amendments I and XIV." Petitioners are not more specific.

The paragraph found to be offensive amounts only to a statement that the Court of Appeals, or any Court subsequently dealing with the dispute which precipitated this litigation, must limit itself to secular documents. Respondents believe that not only is the position of the Supreme Court of Ohio eminently correct, but also that it is 180 degrees removed from a denial of constitu-

tional rights; it reflects rather a profound understanding that the First Amendment prohibits Courts from interfering with the exercise of religion. Accordingly, Respondents urge to this Court that there is no Federal question presented; and suggests that the history of the litigation here involved justifies the only question now extant being phrased in this fashion: "When the Supreme Court of the United States remands a lawsuit to the highest court of a state for consideration in light of a particular pronouncement of the United States Supreme Court, and the State Supreme Court, pursuant to such remand, issues a directory opinion and mandate to its own subservient court with instructions as to how that lower court is to proceed consistent with the pronouncement of the United States Supreme Court, but does not make any substantive ruling concerning the issues central to the litigation, may a party successfully petition this court for Writ of Certiorari in anticipation of losing because of certain limitations embodied in the opinion of the highest state court when it interpreted the opinion of the Supreme Court."

COUNTER-STATEMENT OF THE CASE.

Rather than accept Petitioners' Statement of the Case, seemingly based on what they wished the Record had contained, Respondent submits the following more limited version, identified by specific page reference to Petitioners' Appendix.

Respondents (Plaintiff initially) instituted a Common-Law action asserting a property right in their name (Appendix page 13); Petitioners (Defendant initially) Cross-Petitioned seeking a judicial declaration as to whether Respondents or Petitioners were true Church members (Appendix page 16 and Appendix page 50, numbered paragraph 1).

The trial court found that Respondents, by their conduct, had created a schism (Appendix page 46) (NB: Not that they had been *declared* schismatic); and ordered that Respondents surrender the Church property and their positions of trust (Appendix page 47).

Appeal was taken and, consistent with Ohio procedure, the result was a trial *de novo* on the basis of exhibits and transcript. The Court of Appeals ruled that the unilateral attempt of Yugoslavia to divide the American Diocese into three had been beyond the powers of Belgrade (Appendix page 64); it found also as a fact that Respondents claimed "ecclesiastical autonomy and hence are schismatic"; and then ordered Respondents to deliver to Petitioners all the Church property because, as schismatics, Respondents had no membership rights (Appendix pages 65-66). No such determination was made with respect to Petitioners because of their error in following the unlawfully created partial Diocese. (Parenthetically, in spite of the Court order made in 1967 in this litigation that this Diocese was unlawful, Petitioners, on page 5 of their Peti-

tion herein, again assert that there are three Dioceses, not one.)

Appeal was taken to the Supreme Court of Ohio by Respondents herein where *inter alia* it was claimed that when the Court of Appeals had declared us to be schismatic and denied us our right to worship, it had overstepped the boundaries of the First Amendment and specifically gone beyond the "broad judicial abstention from religious disputes" which was the heart of *Watson vs. Jones*, 13 Wall. 679.

That appeal was denied without opinion, as was Respondents' Motion for rehearing and Respondents herein then became Petitioners to this Court in Case No. 1427 in the October term of 1967, in which matter this Court, on February 24, 1969, granted certiorari, vacated judgment and remanded, for consideration in light of *Mary Blue Hull*, 393 U.S. 440.

The Supreme Court of Ohio after hearing, then remanded this litigation to be adjudicated "by reference to the provisions of the Code of Regulations and By-Laws of the corporation not for profit, the corporate laws of the state, and any other secular instruments not requiring the resolution of religious tenets or doctrine" (Appendix page 76).

Petitioners include in their Statement of Case the following: "The highest ecclesiastical body made a determination of schism" (Petition page 5). The document actually referred to is found on page 78 of the Appendix and is twenty (20) printed pages long. It is evident on its face that it is a letter from the three Bishops who were then (1964) acting as head of the three Dioceses, which have no lawful existence so far as this case is concerned. It is in large part a discussion of certain actions taken by Belgrade with respect to Bishop Dionisije. It concludes

on page 96 with the prayer that those reading the document "remain in the Church of their ancestors." Respondents cannot reconcile this exhortation with Petitioners' statement that the 20 pages somehow amount to a determination of schism.

The Supreme Court of Ohio, when it considered this case on remand, had that same document in front of them (Record—Ohio Supreme Court Case No. 41380 at page 298) and in the opinion, review of which is now sought, stated this (Appendix page 75): "The Record does *not* illustrate that Plaintiff has been ecclesiastically adjudicated to be outside the church doctrine because of the commission of certain acts."

The concluding paragraph of Petitioners' Statement of Facts is that the Supreme Court of Ohio has "made law with respect to the establishment of religion by allowing a majority of an hierarchical body to determine the religion to be practiced in the Church property."

Petitioners' Appendix, of course, contains the opinion of the Supreme Court of Ohio in full (pages 67-76). The initial part of that opinion is a discussion of *Mary Blue Hull* and only pages 72 to 76 need be examined to learn that the Supreme Court did not do what Petitioners claim.

Excerpts of that opinion:

> (1) "The findings (relative to organization relationship powers and duties of the Mother Church) of the Court of Appeals are unnecessary and immaterial to a *neutral* law inquiry utilizing principles of law developed for use in *all* property disputes." (Appendix page 73.)
>
> (2) "The Court of Appeals found that the members of plaintiff association have performed schismatic acts amounting to a withdrawal from the general church. The essence of this finding must lie in a judicial determination that plaintiff has acted contra

to the doctrine and tenets of the church * * * the viability of the principle of the *Hull Memorial* case commands the same judicial abstinence." (Appendix page 73.)

(3) "A review of Ohio law does not reveal recognition of an implied-trust theory of real property * * * Even if it were to have existed, civil judicial cognizance of it is deemed unconstitutional if it necessitates a court deciding church doctrine." (Appendix page 74.)

(4) "* * * we are not confronted with the problem of whether we can constitutionally order the enforcement of a determination made by an ecclesiastical tribunal." (Appendix page 75.)

Respondents believe that rather than making law, the opinion of the Supreme Court of Ohio radiates a total understanding and application of *Mary Blue Hull* and the partial statement made by Justice Brennan (89 S. Ct. 605) that "The logic of this language leaves the civil courts no role in determining ecclesiastical questions in the process of resolving property disputes."

Respondents recognize that much of the foregoing is perhaps beyond what ought to be contained in a Statement of Case and is, in fact, argument. However, Respondents feel compelled to proceed in this fashion in order that those reading this case will be able to easily match up Respondents' objections with that part of the Petition which precipitated the objections.

REASONS FOR NOT GRANTING THE WRIT.

1. Such public interest as there now is in the powers and limitations of civil courts is only concern for the choice from among the methods permitted to the various state court systems for resolution of church disputes consistent with this Court's previous pronouncements in *Mary Blue Hull* and *Eldership*.

Petitioners' listing of Serbian church cases at Appendix, page 128, is totally accurate and certainly illustrates that the dispute central to this issue is a violent one. It would, of course, be possible to compile a list even longer of litigation currently involving the *Four Seasons Nursing Home* or perhaps claims against *Penn-Central*, but Respondents do not believe that this would necessarily justify this Court in entertaining a particular one of such disputes wherein a certiorari was sought.

On page 8 the statement is made that the New Jersey Court which made a decision ultimately resulting in a denial of certiorari (397 U.S. 961) "* * * had the benefit of the *Hull* and *Eldership* decisions * * *" The Petition for writ of certiorari in that case (October term 1969 No. 1012) was an attempt to appeal from an order of the Supreme Court of the State of New Jersey on September 30, 1969. The *Eldership* case was decided on January 19, 1970; and, accordingly, it cannot be true that the New Jersey Court considered the *Eldership* decision.

Perhaps Petitioners are attempting, by implication, to suggest that the Supreme Court of Ohio did not have the benefit of *Eldership*. On February 24, 1970, by letter to the Clerk of the Supreme Court of Ohio, counsel for Petitioners themselves specifically called to the attention of the Supreme Court of Ohio the *Eldership* case. It is not apparent in the language of Ohio's opinion that *Eldership* was considered, but the opinion was dated March 4, 1970,

more than a week subsequent to the letter referred to above; and, obviously, the Supreme Court of Ohio had the opportunity to examine *Eldership* had it wished to do so.

In any case, the most that Respondents can understand from reading the entirety of Part 1 under "Reasons for Granting Writ" is that Petitioners are complaining that certain Serbian church-goers in New Jersey occupying a position described by Petitioners as "identical" have control of church property; and Petitioners, in Ohio, do not. Petitioners are suggesting that "uniform administration of justice" would require that either Petitioners and their allies both be in church or out. Respondents suggests that what Petitioners are really asking the Court to do herein is reverse *Erie vs. Tompkins*, at least with respect to religious property, and begin the ardous task of laying down Federal Common Law.

At any rate, it is not true that Petitioners have been denied their property rights. All the Supreme Court of Ohio did was direct its Lower Courts to apply "neutral principles of law." Respondents suggest that Petitioners are, at best, premature since it is theoretically possible that the application of neutral principles of law by Ohio's Lower Courts could result in their attaining the property rights they are here contending for.

2. The decision of the Supreme Court of Ohio is entirely consistent with the decision of this Court in interpreting Amendments I and XIV to the Constitution of the United States.

Respondent believes that the following sentence found on page 11 of Petitioners' printed argument is the essence of their position that Ohio's decision violates Amendments I and XIV of the Constitution of the United States:

> "Allowing a state court to rule that a majority of a connectional church may divest or divert property dedicated to the use of such church constitutes the establishment of religion contrary to the First Amendment and amounts to taking property rights without due process of law in contravention of the Fourteenth Amendment."

Again Respondent can only suggest that the state court has made no such rule; it has simply directed its lower courts to apply neutral principles of law and then, according to such neutral principles of law, make a determination as to who is entitled to the control of the church property.

Elsewhere (Argument, page 10) it is stated that "there are no special statutes in Ohio relating to a non-profit religious corporation holding title to property dedicated to a hierarchical church body." Respondent's examination of the Revised Code of the State of Ohio has revealed Chapter 1715 entitled "Religious and Benevolent Organizations." It is true that in that chapter there is no special mention of "hierarchical church bodies"; it is equally true that much of that chapter is concerned with the "holding of title to property by non-profit religious corporations."

Specifically, Revised Code 1715.17 reads in its entirety as follows:

> "Property conveyed in trust for the use of a religious society, church, or association, whether incorporated or not, shall be held by the trustees and their successors, appointed as provided in the instrument creating the trust or in case no provision for successor trustees is made in such instrument, then by such successor trustees as are appointed by a competent court. No person shall be elected or appointed by such society, church, or association to act as trustee to the exclusion of any trustee appointed as provided in this section."

On pages 10 and 11 of the Petitioners' argument, claim is made that the Supreme Court of Ohio "in not adopting the formal title approach * * * erred * * * when it ordered the Court of Appeals to make its decision solely under this doctrine, the result of which will place the church property in the hands of the schismatics, who now constitute a majority of the members of the corporation." The Supreme Court of Ohio in 1834 in the case of *Keyser vs. Stansifer*, 6 O. 634, made this pronouncement:

> "Where a religious society purchase land, and the title vests in them in fee, as a corporation, the majority of the society have a right to control its use and occupation, of which they cannot be deprived by any supposed error of doctrine."

Petitioners have conceded that Respondents (termed schismatics) "constitute a majority." In the quotation from this argument found next above, they are objecting to a result which is consistent with Ohio's position since 1834. Additionally, they are suggesting to this court that the three methods of resolution of religious disputes set forth in the concurring opinion of Justices Marshall, Douglass and Brennan in the *Eldership* case have been misunderstood by the Supreme Court of Ohio and that the "formal title" approach is being misapplied in this case. Petitioners are contending that only the *Watson* rule can be

applied in Ohio, in this litigation at least: this is not Respondents' understanding of the position announced by *Mary Blue Hull* and *Eldership*.

In attempting to demonstrate what they believe should have happened, Petitioners direct the court's attention to Exhibits Q1, VV1, QQ1 and DDD1; and assert that those documents demonstrate actions taken in accordance with proper ecclesiastical procedure, which actions should have been enforced by civil courts, resulting in control of the church property being delivered to Petitioners.

The Court will, of course, make its own examination of those documents. However, in short, they are:

1. Q1—a 20-page document concerning the alleged offenses of and punishment of Bishop Dionisije. This document originated in Belgrade in 1964 and nowhere makes mention of individual church-goers.
2. QQ1—a document originating in 1964 in the offices of one of the dioceses having no lawful existence so far as the record of this litigation discloses (numbered paragraph 5, Appendix, page 64), which document is only an accusation of a priest serving in Akron in 1964 and nowhere indicates that the accusation was ever acted upon. In any case, this document makes no mention of individual church-goers in Akron, Ohio.
3. VV1—This is a document emanating in the headquarters of the non-existent diocese, which purports to direct the executive board of the church in Akron to relinquish its duties to named individuals purportedly appointed as caretakers by the Bishop of the non-existent diocese. This document, if it had emanated from a body with any status, is the sort of document which might well be enforced by a civil court in order to preserve peace. However, Petitioners have conceded in their argument that Respondents are the majority; it has been Ohio's law for more than 130 years, as

set forth above, that a majority may not be divested of control. Even without this, VV1 could be used against Respondents only in the application of an implied trust theory, and the Supreme Court of Ohio has stated in the opinion, review of which is here sought, that Ohio does not recognize the implied trust theory.

4. DDD1—again a document emanating from a nonexisting diocese; again a document largely concerned with the supposed transgressions of Bishop Dionisije; again a document containing nowhere any finding of schism or decree of excommunication or similar church pronouncement.

Because so much of the contents of the documents referred to above has to do directly with Bishop Dionisije and because the status of Dionisije is inextricably wound together with the question of the division of the diocese, Respondents inform the Court that only this summer, 1970, was the trial in Illinois concluded (after having consumed 120 plus days) in which Dionisije himself is now being afforded a chance in a civil court consistent with the rule of *Gonzales* (280 U.S. 1) to test those decisions made with respect to him for purposes of determining whether or not those decisions are tainted with "fraud, collusion, or arbitrariness." Only Dionisije has standing to directly attack those decisions; no pronouncement has yet been made resulting from his direct attack; and it is possible that the courts of Illinois will ultimately find that Dionisije has not been punished, removed or defrocked by Belgrade in accordance with Belgrade's own rules. Because of this possibility, it seems senseless for this Court to entertain the Petition for Writ and make an order with respect to a very small part of the Serbian Church dispute in this country, which order necessarily would have to be concerned with the status of Dionisije, not a party to this litigation, and a man whose status has not yet been resolved.

CONCLUSION.

Respondents urge the Court to dismiss the Petition for a Writ of Certiorari. In support of that request, we suggest that the Supreme Court of Ohio has only directed its lower courts to apply neutral principles of law exactly as directed by *Mary Blue Hull* and subsequently amplified by the concurring opinion in *Eldership*.

Respondents believe Petitioners to be in error when they state that the Supreme Court has deprived them of property without due process; it has simply instructed its lower courts to follow due process by applying neutral principles.

Neither has the Supreme Court of Ohio established religion. Obviously, in any litigation between contending factions in a church, there must be a determination made as to whom is a winner or a loser; if that determination is made only by the application of neutral principles of law as ordered by the Supreme Court of Ohio, that determination is not such "establishment of religion" as is proscribed by the First Amendment, although the result necessarily will be that one group is in church and the other group out.

Respondents do not believe that there has been a federal question presented by the latest developments in the litigation; Respondents urge the Court to dismiss the Petition and to allow this litigation to proceed in Ohio courts with Ohio applying its own principles of law.

Respectfully submitted,

BERNARD R. ROETZEL,
Counsel for Respondents.